

UNITED STATES OF AMERICAN
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Luis I. Montanez Z-583-88-6716

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2256

Luis I. Montanez

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.25-15.

By order dated 25 January 1980, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts revoked Appellant's seaman's documents upon finding him guilty of misconduct. The three specifications found proved alleged that while serving as Ordinary Seaman on board SS BANNER under authority of the document above captioned, on or about 10, 13 and 14 November 1979, Appellant failed to perform his duties as bow lookout.

The hearing was held at Boston, Massachusetts, on 29 November 1979 and 15 January 1980.

Appellant failed to appear at the hearing. The Administrative Law Judge entered a plea of not guilty to the charge and each specification on Appellant's behalf, and the hearing proceeded in absentia.

The Investigating Officer introduced in evidence the testimony of one witness and four exhibits.

No evidence was offered in defense.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was served on 6 February 1980. Petition to reopen was filed on 11 March 1980 and denied on 22 April 1980. Appeal from this denial was timely filed.

FINDINGS OF FACT

On 10 through 14 November 1979, Appellant was serving as Ordinary Seaman on board SS BANNER, O.N. 272077, and acting under

authority of his document while the vessel was at sea.

On 16 November 1979, Appellant was served with a charge sheet alleging misconduct on the part of Appellant, based on three specifications. Appellant acknowledged by his signature on the charge sheet that he had been apprized of his rights.

A hearing on the charges was held in Boston on 29 November 1979 and continued to 15 January 1980. Despite proper notice, Appellant failed to appear. After the Administrative Law Judge insured compliance with 46 CFR 5.20-25, the hearing proceeded in absentia.

The Administrative Law Judge, after due consideration of all the evidence, concluded that the specifications and charge were proved. He entered an order revoking Appellant's Merchant Mariner's Document on 25 January 1980. Appellant petitioned to reopen the hearing on 11 March 1980; the petition was denied 22 April 1980.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge denying Appellant's petition to reopen the proceedings. It is urged that evidence to be adduced by Appellant would tend to demonstrate his innocence of the charge and specifications, or in the alternative tend to mitigate the severity of any order to be imposed.

APPEARANCE: Harry A. EZRATTY, Esq., of San Juan, P.R.

OPINION

Administrative proceedings to further the aim of safety of life and property at sea under the authority of R.S. 4450 are conducted in accordance with the governing statute and the implementing regulations. As a necessary predicate to the proceedings, notice of the charge and notice of procedural rights must be given to the individual charged. In the instant case, the Administrative Law Judge, on the record, verified that these matters were communicated to Appellant. The charge sheet reflects Appellant's receipt of the charge and his signature attests to the fact that "... the substance of the complaint, nature of the proceedings, my rights as specified above and the results of my failure to appear have been fully explained to me." In the fact of this evidence Appellant will not be heard to complain that he was not cognizant of this rights with respect to the availability of witnesses, presentation of evidence, or venue of the proceedings.

It is well settled that "[o]n a petition to reopen, Appellant cannot argue that there is 'newly discovered evidence' when he has failed to appear for hearing on due notice." Appeal Decision No. 1641. This is particularly true with respect to evidence within the personal knowledge of Appellant, such as his health of the names of fellow crewmembers. Appellant's brief contends that the names of other crewmen were not known to Appellant at the time of hearing, but also recognizes that they would be readily obtainable from the vessel's crewlist. To comply with the requirements of 46 CFR 5.25-5(b)(4) Appellant must aver facts sufficient to demonstrate that due diligence could not have led to the discovery of such evidence prior to completion of the hearing. It is readily apparent that Appellant can not fulfill this requirement.

An R.S. 4450 proceeding may only be reopened when the governing regulations are complied with. Appellant has failed to shoulder his burden in this regard. I also note that Appellant would seek to present evidence to mitigate the charge. By failing to appear, however, Appellant waived that opportunity. Appeal Decision No. 1957. In light of the multiple offenses involved and the attendant circumstances of cargo, area of operation, and lives at risk, I find that the order does not exceed the permissible bounds of discretion which an Administrative Law Judge possesses in fashioning an appropriate order.

CONCLUSION

Appellant's petition to reopen fails to demonstrate that newly discovered evidence has been developed, or in the alternative that due diligence could not have led to the discovery of the evidence prior to completion of the hearing. Consequently, no grounds for reopening the hearing in this case have been presented.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 22 April 1980, is AFFIRMED. The decision and order of 25 January 1980 stands as final agency action in the case.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 10th day of June 1981.